Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules	)	CC Docket No. 00-175

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel, and pursuant to Section 1.415 of the Commission's Rules,[1] hereby replies to the comments of other parties on the *Notice of Proposed Rulemaking* ("*NPRM*") released in the captioned proceeding on September 14, 2001. A number of parties, all independent incumbent local exchange carriers or representatives thereof ("Independent ILEC Commenters"), urge the Commission to eliminate the separate affiliate requirement set forth in Section 64.1903 of the Commission's rules, stressing primarily that the existence of the requirement creates an inconvenience for such entities. None, however, addresses the essential issue; namely, that it is the existence of the separate affiliate requirement which has prevented these incumbent carriers, in large measure, from engaging in anticompetitive and predatory tactics and that unfortunately, competitive forces sufficient to prevent such tactics simply do not yet exist in the many rural areas which are predominantly served by such independent incumbent local exchange carriers ("Independent ILECs").

[1] 47 C.F.R. § 1.415.

As the Commission is aware, when evaluating whether a particular rule is no longer necessary in the public interest, an analysis of the existence or dearth of *"meaningful economic competition*"[2] is mandatory. Only after having found that such meaningful competition exists may the Commission determine that a regulation is no longer necessary in order to protect the public interest, and only then is the Commission justified in repealing or modifying a regulation. Such a determination cannot be made here.

In support of their request that the Commission eliminate altogether the separate affiliate requirement of §64.1903 of the Commission's Rules, certain Independent ILEC Commenters repeat once again the proposition that the requirement is unnecessary because "the harm to IXCs that the Commission envisioned and that prompted the adoption of § 64.1903, never materialized."[3] ASCENT notes that it is unusual logic indeed which would support elimination of a regulation precisely because it is effective in achieving its intended purpose. If anything, the success of a regulation is reason for its continued application in a circumstance such as this, where little if any change has taken place in the competitive landscape since adoption of the regulation. And in any event, as WorldCom, Inc. ("WorldCom") points out, it is "[b]ecause the rules were put in place to deter anticompetitive activity by facilitating detection of such activity, the Commission has consistently rejected independent LEC claims that a lack of allegations of anticompetitive behavior demonstrates that independent LECs lack the ability and incentive to engage in

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[2] 47 U.S.C. § 161.

[3] Comments of United States Telecom Association ("USTA") at 2; *see also* Comments of ALLTEL Communications, Inc. ("ALLTEL) at 5; Comments of the Independent Telephone & Telecommunications Alliance and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("ITAA/OPATSCO") at 4, 15. Indeed, contrary to consistent Commission findings reaching the opposite conclusion, USTA goes so far as to assert, in a showing of pure and unsupported opinion, "that the perceived dangers never existed." Id.

anticompetitive conduct."[4] Thus, the proposition advanced by the Independent I LEC Commenters is unavailing.

Like ASCENT, AT&T Corp. ("AT&T") and WorldCom note that the Commission has "repeatedly found that the existing rules are necessary to guard against anticompetitive behavior that would cause substantial harm"[5] and that the Commission, having "thoroughly analyzed the relative benefits and costs of the existing rule . . . most recently, only two years ago . . . has consistently reaffirmed the validity" thereof.[6] The Commission has done so not on the threat of speculative or imaginary dangers, but rather, to prevent the very real – and very likely – exercise of market power by Independent ILECs to disadvantage their competitors. The Commission's holdings were not made in a vacuum, but rather with full knowledge of the ability and disposition of incumbent providers to manipulate their control of bottleneck facilities to the detriment of competing providers.

AT&T, drawing from the Commission's own findings, aptly describes the dangers which the Independent ILEC Commenters ignore:

> "[a]bsent appropriate and effective regulation," independent incumbent LECs therefore "have the ability and incentive to misallocate costs" from their long distance services to their local exchange services, which would "distort price signals" and "cause substantial harm to consumers, competition, and production efficiency."

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[4] Comments of WorldCom, pp. 6-7 (citing Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace; Leaco Rural Telephone Cooperative, Inc. Petition for Waiver (Second Order on Reconsideration and Memorandum Opinion and Order) 14 FCC Rcd. 10771 (1999), ¶ 14 ("Second Order on Reconsideration")).

[5] Comments of AT&T at 1.

[6] Comments of WorldCom at 3.

> These LECs also "potentially could use [their] market power in the provision of exchange access service to advantage [their] interexchange affiliate[s] by discriminating against the[ir] affiliate[s'] interexchange competitors" in the provisioning of access."[7]

These risks to competition have not lessened since adoption of §64.1903. It is without doubt that Independent ILECs retain the characteristics of "dominant" providers within the exchanges where they operate;[8] furthermore, as WorldCom has noted in opposing the elimination of the separate affiliate requirement, "the Staff Report indicates, ILECs retain overwhelming market power in local markets, without regard to whether the ILEC is a Regional Bell Holding Company or an Independent LEC."[9]

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[7] Comments of AT&T, pp. 1-2 (Citing to Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, (Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61), 12 FCC Rcd. 15756 (1997) ("Second Report and Order"), ¶¶ 159, 160.).

[8] Comments of ICORE, Inc. ("ICORE") at 3.

[9] Comments of WorldCom, Inc., on Biennial Regulatory Review 2000 Staff Report (October 10, 2000), p. 5.

It is no answer to suggest that "[s]hould, in some limited number of cases, an Independent ILEC inappropriately and unlawfully leverage its position in the interexchange market based on its position in its local exchange service market, IXCs can always seek redress from the FCC through the § 208 complaint process or in court."[10] As AT&T notes, and as the Commission has also found, discriminatory activities such as the misallocation of costs and the misuse of market power in the provision of exchange access service would be "'difficult to police' because 'the level of [LEC] 'cooperation' with unaffiliated interLATA carriers [would be] difficult to quantify."[11] Furthermore, the Commission has never sanctioned the "inappropriate and unlawful leverage" by a carrier of its market position and no amount of, in this case illusory, after-the-fact complaint resolution mechanisms could adequately compensate a carrier subjected to such treatment.

The Independent ILEC Commenters also ignore that the Commission has provided a specific indication of what evidence it would find sufficient to remove the separate affiliate provision, evidence not available today:

> the emergence of competition in the local exchange and exchange access marketplace. . . . competition . . . developed sufficiently to reduce or eliminate an independent LEC's bottleneck control of exchange and exchange access facilities.[12]

The Commission has also specifically rejected arguments "that rural and mid-sized independent LECs have less incentive and ability than larger LECs to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers"[13] noting that "the size of a

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[10] Comments of USTA, p. 3.

[11] Comments of AT&T, p. 2 (citing Second Report and Order, 12 FCC Rcd. 15756 at ¶¶ 159, 160.)

[12] Second Report and Order, ¶ 196.

[13] Id. at ¶ 17.

LEC will not affect its incentives to improperly allocate costs between its monopoly services and its competitive services,"[14] remaining unconvinced that "the potential for competition in the local exchange market has reduced the actual ability of small LECs to leverage their monopoly power in

[14] Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace (Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61), 12 FCC Rcd. 15756 (1997), ¶ 180.

an anticompetitive manner."[15] Nothing in the Updated Staff Report, or the Report issued earlier this year, suggests that this situation has changed.

As part of its biennial review obligations, the Commission is enjoined from repealing or modifying a regulation "in effect at the time of the [Commission's] review that appl[ies] to the operations or activities of any provider of telecommunications service" without having first determined that "such regulation is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service."[16] Identifying the point at which it would be appropriate to relieve Independent ILECs from the separations requirements, the Commission has specifically noted that it would look to "whether the emergence of competition in the local exchange and exchange access marketplace justifies removal of the Fifth Report and Order requirements."[17] Such a time has not yet arrived. Addressing the status of competition, the Updated Staff Report noted that "[c]ompetition in the local exchange and exchange access markets is growing, although competitive local exchange carriers still serve only a small percentage of local exchange lines," with service to residential consumers in the rural areas frequently served by independent incumbent LECs lagging far behind competitive initiatives in other areas.[18] Indeed, even the Independent ILEC Commenters admit that very little competition has yet developed in their

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[15] Second Order on Reconsideration, 14 FCC Rcd. 10771 at ¶ 17.

[16] 47 U.S.C. § 161(a)(1) and (2).

[17] Second Report and Order, 12 FCC Rcd. 15765 at ¶ 196.

[18] Federal Communications Commission, Biennial Regulatory Review 2000, Updated Staff Report, January 17, 2000, at p. 150.

service areas.[19] Under these circumstances, the Commission cannot simultaneously grant the relief requested by the Independent ILEC Commenters and satisfy the dictates of Section 161.

The comments reveal that in the main, the Independent ILEC Commenters cite mere inconvenience as a justification for elimination of the separate affiliate requirement of §64.1903. [20] As set forth below, however, those few Independent ILECs truly in need of limited relief from the separate affiliate regulations need not be left without redress as the separate affiliate requirement continues to apply going forward. While not opposing the granting, upon an appropriate showing, of limited relief, ASCENT fully agrees with AT&T, which highlights the Commission's determination that "the regulatory burdens imposed by the separate affiliate rules 'are not unreasonable in light of the benefits these requirements yield in terms of protection against improper cost allocation, unlawful discrimination and price squeezes,'"[21] that mere inconvenience cannot tip the balance in favor of wholesale evisceration of the requirement.

As ASCENT pointed out in its comments, the Commission could fashion a well-tailored remedy for Independent ILECs which are truly experiencing "hardship" as a result of the existing rules through adoption of the Staff's recommendation that the Commission undertake on a case-by-case basis requests for "limited waivers of the separate subsidiary requirements in circumstances where the prohibition on joint ownership creates hardship for an ILEC's equipment choices." And unlike interexchange carriers and competitive LECs, which as the Commission has noted, will have difficulty adequately demonstrating an incumbent LEC's cross-subsidization or

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[19] *See, e.g.,* Comments of NTCA, p. 4 ("Rural ILECs continue, in many areas, to be the only entities willing to offer competitive toll services in rural areas or are one of a small number of such entities competing in other rural areas.")

[20] *See, e.g.,* Comments of the National Telephone Cooperative Association ("NTCA"), p. 2 ("Imposing the separate affiliate requirement on rural ILECs would therefore only cause them to incur additional legal, accounting and administrative costs. . .")

[21] Comments of AT&T, p. 7 (citing Second Report and Order, 12 FCC Rcd. 15765 at ¶ 167).

other predatory activities, the Independent ILEC which is truly placed in a position of hardship with respect to equipment choices because of the joint ownership rules should be easily able to document for the Commission the *bona fides* of its claim. All essential evidence would reside within its possession. Given the dangers involved in eliminating the separation requirement and the comparatively small burden on Independent ILECs of continued compliance therewith, the existence of this narrowly-tailored remedy is clearly the preferable approach.

Consistent with the foregoing, ASCENT urges the Commission to refrain from modifying separate affiliate requirement of § 64.1903 of the Commission's Rules, relying instead upon a case-by-case waiver process to resolve cases of true Independent ILEC hardship which may in rare cases result from application of the Commission's existing regulation.

Respectfully submitted,

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